Award No. 10567

Docket No. TE-9384

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

D. E. LaBelle, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

GEORGIA RAILROAD

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Georgia Railroad, that:

1. Carrier violated Article V of the August 21, 1954 Agreement when it failed to allow the following claim of Agent-Telegrapher Cooper of Madison, Georgia, as presented after having been in default of the time limits:

> This is the result of an arrangement gotten up to require conductors to furnish information to the railroad to which cars are interchanged to enable them to accept interchange cars in the absence of the agent's being on duty, information which has previously not been required of conductors but has been a part of the duties of the agent and amounts to transferring agent's duties to others than covered by Telegraphers' Agreement and constitutes a flagrant violation of the Scope Rule thereof. Claim is therefore herewith made for the reimbursement of Agent-Telegrapher Cooper for amounts illegally withheld, also for payment of similar overtime tickets which declined, viz., February 26, March 12, 26, June 4, July 3, 25, or for any previous or subsequent dates that it may be developed such violation obtained.

2. As a result of the violation of Article V above stated, Carrier shall compensate Agent-Telegrapher Cooper at Madison, a two hour call for each day subsequent to July 3, 1955, on which the violation occurred and until the Carrier has corrected the assignment of work at Madison, Georgia, in accordance with the Agreement.

EMPLOYES' STATEMENT OF FACTS: Agent-Telegrapher I. B. Cooper was assigned to the position located at Madison, Georgia, during the period when the violations complained of occurred. On May 18, 1954, he received a trainmaster's bulletin which put into effect the actions complained of. The bulletin read as follows:

> "In order that cars for Central of Georgia Railroad at Madison can be interchanged on Saturday after the agent goes off duty, a way bill box has been installed on telegraph pole opposite switch

5. This agreement is not intended to deny the right of the employes to use any other lawful action for the settlement of claims or grievances provided such action is instituted within 9 months of the date of the decision of the highest designated officer of the Carrier.

6. This rule shall not apply to requests for leniency."

Carrier did not comply with 2 of that article and paid the claim accordingly. Such payment was without prejudice to carrier's position and had no bearing on subsequent claims. By time check No. 81, issued June 21, 1956, carrier disposed of claims for the dates referred to in Item 1, without prejudice to its position and any subsequent claims will have to be handled in accordance with the rules of the agreement.

In Item 2 of the claim Petitioner seems to be arguing that because of time limit violation on the listed claims carrier is obligated to pay any subsequent claims. Such is certainly not the case. Any subsequent claims go back to 1 (a) and will have to be handled accordingly.

Petitioner cannot deny the payments of the claims filed in Item 1 of the claim. As to Item 2, that claim is based on an erroneous interpretation of time limit on claims rule.

We respectfully request for the reasons contained herein that the claim be dismissed or denied.

To the extent possible data contained herein has been made available to Petitioner.

OPINION OF BOARD: The Claimant herein is claiming a violation of the Scope Rule of its Agreement with the Carrier, when the Carrier transferred certain duties which had previously been performed by the Claimant Cooper, Agent-Telegrapher at Madison, Georgia, to conductors.

This claim was filed for specific dates set forth in the claim and "or for any previous or subsequent dates that it may be developed such violation obtained."

This claim was denied in successive appeals to the Assistant Superintendent, the Superintendent and finally to Mr. Marshall L. Bowie, Director of Personnel of the Carrier, by letter dated September 23, 1955. Mr. Bowie failed to take any action relative to said claim within the sixty (60) day period prescribed by the rules and not until March 20, 1956, at which time he sent a letter denying the claim. On April 6, 1956, Mr. Bowie in a letter to the General Chairman of the Organization, admitted the time limit rule had been violated and in June 1956, mailed a voucher for payment of the claim for the specific dates set forth in the claim, without comment on the claim for continuing violations.

The Carrier has attacked the jurisdiction of this Division to consider this dispute on the basis that the requirements of the Railway Labor Act and the Rules of Procedure of the National Railroad Adjustment Board, as embodied in Circular No. 1, have not been met, in that the claim was never considered in conference between representatives designated and authorizd to confer, respectively, for the Carrier and the Organization.

We feel that the Railway Labor Act and the Rules of Procedure of the National Railroad Adjustment Board give to the parties certain rights, but, by the same token, impose certain duties and obligations upon each of them. We are of the opinion that in order to assert a violation of such guaranteed right, that the party seeking such ruling must first bring itself within the statute by making a request for a conference. If a conference is requested and denied, then and only then, can such a charge of non-compliance with the Act be successfully raised.

Thus we hold that the Carrier, not having requested a conference cannot now defeat consideration of this claim.

The record shows that upon the dates set forth in the claim and thereafter upon unidentified dates and occasions, work customarily performed by Agent-Telegrapher Cooper, and covered by the Telegraphers' Agreement, has been performed by conductors, not parties to such Agreement.

Inasmuch as the Carrier has paid from February 26, 1955 through July 3, 1956, we hold that the claim for subsequent violations after July 3, 1956, is a valid one and must be sustained in accordance with the applicable provisions of the Telegraphers' Agreement for such dates and occasions as such work was thus performed and the case will be remanded to the parties for determination of the necessary facts and for disposition on the property.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of April 1962.

DISSENT TO AWARD NO. 10567, DOCKET NO. TE-9384

The fourth paragraph of the Opinion of Board in Award 10567 outlines the Carrier's challenge to the Board's jurisdiction to consider the claim because it was not handled in accordance with the provisions of the Railway Labor Act and the Rules of Procedure of the National Railroad Adjustment Board.

The fifth paragraph of the Opinion erroneously disposes of this challenge by concluding:

> "If a conference is requested and denied, then and only then, can such a charge of non-compliance with the Act be successfully raised."

Section 2, Second of the Railway Labor Act is mandatory that:

> "All disputes * * * shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employes thereof interested in the dispute."

The Board owes its existence to Section 3 of the Railway Labor Act. Section 3, First (i) of the Act reads in part:

> "(i) The disputes between an employe or group of employes and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements * * *, shall be handled **in the usual manner** up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board * * *." (Emphasis ours.)

The above quotation is the source of this Board's jurisdiction. It follows that unless, within the meaning of the Railway Labor Act, the parties have handled a dispute on the property **in the usual manner,** this Board has no jurisdiction of such dispute. As the dispute in this docket was not handled in the "usual manner" as required by the Railway Labor Act, the Board should have properly dismissed it for lack of jurisdiction.

After erroneously assuming jurisdiction, the majority commits further serious error in concluding:

> "Inasmuch as the Carrier has paid from February 26, 1955 through July 3, 1956 [sic], we hold that the claim for subsequent violations after July 3, 1956 [sic], is a valid one and must be sustained in accordance with the applicable provisions of the Telegraphers' Agreement * * *."
>
> (Note: The record shows that claims for specific dates through July 3, 1955, were paid.)

The claim submitted to the Board was that the Carrier defaulted under the time limit rule. The violation of the time limit rule was not a continuing violation. It occurred just once and the Carrier paid for that violation. This payment by the Carrier in no manner validated claims that may have arisen subsequently.

The Award is in further error in remanding the case to the parties for determination of the necessary facts and for disposition on the property. There is no rule in the Agreement that would require the Carrier to search its records in order to make a claim or claims for the Organization. (Award 9343.)

For the foregoing reasons, among others, we dissent.

/s/ P. C. Carter
/s/ R. A. Carroll
/s/ W. H. Castle
/s/ D. S. Dugan
/s/ T. F. Strunck

ANSWER TO DISSENT TO AWARD NO. 10567, DOCKET NO. TE-9384

Ordinarily a dissent which basically does no more than repeat contentions that were rejected does not require an answer. Here, however, because in my opinion the rejected contentions are so fundamentally unsound and since they obviously have not been abandoned, I feel it is necessary that I record my disagreement with them.

The first contention made by the dissenters, dealing with the question of what is required by way of conferences prior to submission of a dispute to the Board, has been rejected so many times that the point ought to be considered as having been settled.

The basic fallacy in their argument is failure of the dissenters to give any value or effect to Section 2, Sixth, of the Railway Labor Act, which very clearly requires such conferences only if one party serves notice on the other of a desire to confer. In the absence of such notice, as was the case here, no conference is required, and the Award correctly so holds. If this were not so, and if the contention of the dissenters with respect to the portions of the Act they quote were sound Section 2, Sixth, would be mere surplusage. Obviously Congress had no such intent to waste words when it included this paragraph.

The second contention of the dissenters is more subtle but equally unsound. This contention embodies the view that a Carrier's liability, when it fails to comply with the time limit rule involved, may be terminated by its own act, either of recognizing the default or rendering a belated decision on the merits of the claim.

This contention, with its accompanying rationalization, has confused some referees. A prime example is Award 10401 where, after noting that the agreement makes no provision for terminating a claim under comparable circumstances, the majority proceeded to supply what it said it thought the parties meant. No such error occurred in Award 10567.

The basic unsoundness of the dissenters' contention lies in the studied avoidance of any reference to the precise language of the rule. That language includes the following:

> ". . . Should any such claim or grievance be disallowed, the Carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employe or his representative) in writing of the reasons for such disallowance. **If not so notified, the claim or grievance shall be allowed as presented,** but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances." (Emphasis ours.)

The underscored language, which the dissenters would modify, is not ambiguous. It does not say that the claim will be allowed up to the time the carrier recognizes the default or makes a decision on the merits. It unequivocally says that the claim shall be allowed "as presented".

If the parties had intended any modification or limitation they could easily have included the necessary language.

Award 10567 correctly applied the language which the parties did include in the rule. And there it stopped. The majority correctly refused to invade the field of agreement revision. It is axiomatic that this Board does not have the power to revise agreements as was attempted in Award 10401 and as the dissenters would have it attempt here.

The last contention of the dissenters is as unsound as their first two. The award does not require a search of Carrier's records "in order to make a claim or claims for the Organization". It simply requires the parties to determine the necessary facts and to dispose of the case accordingly. The claim was made in the first instance for certain dates and "for any previous or subsequent dates that it may be developed such violation obtained." The Carrier brought itself within the requirement that the claim ". . . shall be allowed as presented . . .".

It necessarily follows that something must be done to develop the facts as to other such violations. The method prescribed by the award, the remand for determination of the facts and disposition accordingly, is so well established by prior awards, with and without referees, that no further comment is necessary.

The dissenters are correct in noting the inadvertence with respect to the dates. Quite obviously the date shown as July 3, 1956 should be July 3, 1955.

J. W. Whitehouse
Labor Member